STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

ATTORNEY GENERAL ~~BILL SCHUETTE~~,

Plaintiff, - Appellee

v

~~HONORABLE HUGH CLARKE~~,
54-A DISTRICT COURT, JUDGE

Defendant. - Appellant

Supreme Court No. _____

Court of Appeals No. 301979

B. ERIC RESTUCCIA (P49550)
Solicitor General
Counsel of Record
525 West Ottawa Street # 408
Lansing, Michigan 48913
Telephone: (517) 373-1124

LAWRENCE P. NOLAN (P25908)
Attorney for the Defendant
The Honorable Hugh Clarke
Nolan, Thomsen & Villas, P.C.
239 South Main Street
Eaton Rapids, Michigan 48827
Telephone: (517) 663-3306

HEATHER S. MEINGAST (P55439)
Assistant Attorney General
Attorney for Bill Schuette
PO BOX 30212
Lansing, Michigan 48909
Telephone: (517) 373-6889

HON. THOMAS E. BRENNAN, SR. (P11172)
Co-Counsel for the Defendant
The Honorable Hugh Clarke
12953 Grand Traverse Drive
Lake Jovita
Dade City, Florida 33525
Telephone: (352) 588-0421

NOTICE OF HEARING

EMERGENCY APPLICATION FOR LEAVE TO APPEAL

BRIEF IN SUPPORT OF EMERGENCY APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

FILED
FEB
CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

NOLAN, THOMSEN & VILLAS, P.C.
ATTORNEYS AT LAW
39 SOUTH MAIN STREET
ATON RAPIDS, MICHIGAN
48827-1291
(517) 663-3306

STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

ATTORNEY GENERAL BILL SCHUETTE,

Plaintiff,

v

HONORABLE HUGH CLARKE,
54-A DISTRICT COURT,

Defendant.

Supreme Court of No. _____

Court of Appeals No. 301979

B. ERIC RESTUCCIA (P49550)
Solicitor General
Counsel of Record
525 West Ottawa Street # 408
Lansing, Michigan 48913
Telephone: (517) 373-1124

LAWRENCE P. NOLAN (P25908)
Attorney for the Defendant
The Honorable Hugh Clarke
Nolan, Thomsen & Villas, P.C.
239 South Main Street
Eaton Rapids, Michigan 48827
Telephone: (517) 663-3306

HEATHER S. MEINGAST (P55439)
Assistant Attorney General
Attorney for Bill Schuette
PO BOX 30212
Lansing, Michigan 48909
Telephone: (517) 373-6889

HON. THOMAS E. BRENNAN, SR. (P11172)
Co-Counsel for the Defendant
The Honorable Hugh Clarke
12953 Grand Traverse Drive
Lake Jovita
Dade City, Florida 33525
Telephone: (352) 588-0421

THE HONORABLE HUGH CLARKE'S EMERGENCY APPLICATION FOR LEAVE TO APPEAL

Dated: February 1, 2011

By: Lawrence P. Nolan (P25908)
Attorney for the Defendant
Nolan, Thomsen & Villas, P.C.
239 South Main Street
Eaton Rapids, Michigan 48827
Telephone (517) 663-3306

FILED

FEB - 1 2011

CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

NOLAN, THOMSEN
& VILLAS, P.C.
ATTORNEYS AT LAW
239 SOUTH MAIN STREET
EATON RAPIDS, MICHIGAN
48827-1291
(517) 663-3306

NOW COMES, the Defendant, HUGH CLARKE, by and through his attorney Lawrence P. Nolan of the law firm of Nolan, Thomsen & Villas, P.C., and for Defendant's Emergency Application For Leave to Appeal states as follows:

1. That on December 20, 2010, Hugh Barrington Clarke, Jr. was appointed by Governor Jennifer Granholm to fill a vacancy on the 54-A District Court, arising from the appointment of the incumbent Judge, Amy Krause, to the Michigan Court of Appeals. (Exhibit 1).

2. That on November 2, 2010, Judge Krause had been re-elected to serve as a judge of the 54-A District Court.

3. That Attorney General, Bill Schuette, filed a Complaint for *Quo Warranto* in the Michigan Court of Appeals on January 7, 2011, contending that Judge Clarke only had the right to serve on the 54-A District Court until noon on January 1, 2011.

4. That the Attorney General's position is that Judge Clarke's position as judge of the 54-A District Court terminated at that time and that Governor Rick Snyder had the right to appoint Judge Clarke's successor.

5. That on January 28, 2011 the Defendant filed in the Michigan Court of Appeals, an Answer to the Attorney General's Quo Warranto Complaint, Brief in Support of Defendant's Answer to the Attorney General's Quo Warranto Complaint, a Response to the Plaintiff's Motion for Immediate Consideration, and Defendant's Motion to Bypass the Court of Appeals.

6. That the Defendant the Honorable Hugh Clarke files this Emergency

NOLAN, THOMSEN
& VILLAS, P.C.
ATTORNEYS AT LAW
39 SOUTH MAIN STREET
RON RAPIDS, MICHIGAN
48827-1291
(517) 663-3306

Application for Leave to Appeal pursuant to MCR 7.301(A)(II)(6) and MCR 7.302(F).

7. That the Defendant requests immediate consideration of his Emergency Application for Leave to Appeal and moves to bypass the Michigan Court of Appeals for this *Quo Warranto* action so it can be decided by the Michigan Supreme Court.

8. That the issues to be considered by the Michigan Supreme Court in this Emergency Application for leave to appeal are:

(a). Whether Attorney General v Riley Is Not Binding Precedent Or Entitled To Stare Decisis

(b). Whether Judge Clarke is Entitled to Retain His Seat Under the Rationale of *Kelley* v *Riley*

(c). Whether *Attorney General* v *Riley* Was Incorrectly Decided and Should Be Repudiated

(d). Whether Article 6 §4 Allows the Michigan Supreme Court to Remove a Sitting Judge

9. That this matter should be decided by the Michigan Supreme Court because:

(a) this matter involves Article 6 §4 of the Michigan Constitution which forbids the Supreme Court from removing a Judge.

(b) the issue involves a substantial question of law as to the validity of a legislative act;

(c) the issue has significant public interest;

(d) because of the Attorney General's allegation of the impropriety of the Defendant, the Honorable Hugh

OLAN, THOMSEN
& VILLAS, P.C.
ATTORNEYS AT LAW
9 SOUTH MAIN STREET
ON RAPIDS, MICHIGAN
48827-1291
(517) 663-3306

Clarke's term of office, the Honorable Hugh Clarke, and the people of the City of Lansing have suffered and will continue to suffer irreparable damage if this matter is not decided immediately by the Michigan Supreme Court;

(e) the issue involves legal principles of major significance to the state's jurisprudence;

(f) the *Quo Warranto* Complaint alleges that an action of the executive branch of state government is invalid; and

(g) that it is very likely that the party receiving an adverse opinion for the Michigan Court of Appeals would appeal its decision to this Honorable Court.

WHEREFORE, the Defendant, THE HONORABLE HUGH CLARKE, respectfully requests that this Honorable Court grant his Emergency Application for Leave to Appeal and Bypass the Michigan Court of Appeals for the reasons stated in this Emergency Application for Leave to Appeal and its accompanying Brief.

Respectfully Submitted,

NOLAN, THOMSEN & VILLAS, P.C.

Dated: February 1, 2011 By: Lawrence P. Nolan

Lawrence P. Nolan (P25908)
Attorney for Defendant
The Honorable Hugh Clarke

NOLAN, THOMSEN & VILLAS, P.C.
ATTORNEYS AT LAW
9 SOUTH MAIN STREET
ON RAPIDS, MICHIGAN
48827-1291
(517) 663-3306

JENNIFER M. GRANHOLM
GOVERNOR

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

JOHN D. CHERRY, JR.
LT. GOVERNOR

December 20, 2010

The Honorable Terri Lynn Land
Secretary of State
Office of the Great Seal
Lansing, MI 48909

Dear Secretary Land:

Please be advised of the following appointments to office:

Judge of Probate, Wayne County Probate Court

Mr. Terrance A. Keith of 12971 Strathcona, Detroit, Michigan 48203, county of Wayne, is appointed as Judge of the Wayne County Probate Court, succeeding Judge David Syzmanski for a term commencing December 28, 2010 and expiring at twelve noon, January 1, 2013.

Judge of the District Court for the 54-A Judicial District

Mr. Hugh B. Clarke, Jr. of 3800 Colechester, Lansing, Michigan 48906, county of Ingham, succeeding Judge Amy Krause who has been appointed to the Court of Appeals, is appointed as Judge of the District Court for the 54-A Judicial District for a term effective December 22, 2010, for the balance of the term that commenced at 12 noon on January 1, 2005 and continues until a successor is elected and qualified.

Judge of Probate, Tuscola County Probate Court

Ms. Amanda L. Roggenbuck of 6895 Serena Drive, Unionville, Michigan 48767, county of Tuscola, is appointed as Judge of the Tuscola County Probate Court, for a term effective December 31, 2010 upon the resignation of Judge W. Wallace Kent and expiring at twelve noon, January 1, 2013.

Sincerely,

Jennifer M. Granholm
Governor

FILED BY THE GREAT SEAL
2010 DEC 22 PM 1:32
STATE OF MICHIGAN

P.O. BOX 30013 • LANSING, MICHIGAN 48909
www.michigan.gov

PENGAD 800-631-6989
EXHIBIT 1
Printed by members of UAW
Exh 1

STATE OF MICHIGAN

IN THE SUPREME COURT

ATTORNEY GENERAL BILL SCHUETTE,

Plaintiff,

v

HONORABLE HUGH CLARKE,
54-A DISTRICT COURT,

Defendant.

Supreme Court No.

Court of Appeals No. 301979

BRIEF OF THE HONORABLE HUGH CLARKE IN SUPPORT OF HIS EMERGENCY APPLICATION FOR LEAVE TO APPEAL

B. ERIC RESTUCCIA (P49550)
Solicitor General
Counsel of Record
525 West Ottawa Street # 408
Lansing, Michigan 48913
Telephone: (517) 373-1124

LAWRENCE P. NOLAN (P25908)
Attorney for the Defendant
The Honorable Hugh Clarke
Nolan, Thomsen & Villas, P.C.
239 South Main Street
Eaton Rapids, Michigan 48827
Telephone: (517) 663-3306

HEATHER S. MEINGAST (P55439)
Attorney for Bill Schuette
Assistant Attorney General
PO BOX 30212
Lansing, Michigan 48909
Telephone: (517) 373-6889

HON. THOMAS E. BRENNAN, SR.(P11172)
Co-Counsel for the Defendant
The Honorable Hugh Clarke
12953 Grand Traverse Drive
Lake Jovita
Dade City, Florida 33525
Telephone: (352) 588-0421

ORAL ARGUMENT REQUESTED

Dated: February 1, 2011

By: Lawrence P. Nolan (P25908)
Attorney for the Defendant
Nolan, Thomsen & Villas, P.C.
239 South Main Street
Eaton Rapids, Michigan 48827
Telephone (517) 663-3306

NOLAN, THOMSEN
& VILLAS, P.C.
ATTORNEYS AT LAW
39 SOUTH MAIN STREET
TON RAPIDS, MICHIGAN
48827-1291
(517) 663-3306

Table of Contents

NOLAN, THOMSEN
& VILLAS, P.C.
ATTORNEYS AT LAW
39 SOUTH MAIN STREET
TON RAPIDS, MICHIGAN
48827-1291
(517) 663-3306

Index of Authorities

Cases

OLAN, THOMSEN
& VILLAS, P.C.
ATTORNEYS AT LAW
9 SOUTH MAIN STREET
ON RAPIDS, MICHIGAN
48827-1291
(517) 663-3306

Constitutional Provisions

NOLAN, THOMSEN & VILLAS, P.C.
ATTORNEYS AT LAW
119 SOUTH MAIN STREET
RON RAPIDS, MICHIGAN
48827-1291
(517) 663-3306

Statutes

Court Rules

Miscellaneous

OLAN, THOMSEN
& VILLAS, P.C.
ATTORNEYS AT LAW
9 SOUTH MAIN STREET
ON RAPIDS, MICHIGAN
48827-1291
(517) 663-3306

Statement of Basis of Jurisdiction

The Michigan Supreme Court has Jurisdiction over this matter pursuant to MCR 7.301(A)(II)(6) and 7.302(F).

Pursuant to MCR 7.302(A)(1)(a) the Defendant seeks dismissal of the Plaintiff's Complaint for *Quo Warranto.*

JOLAN, THOMSEN
& VILLAS, P.C.
ATTORNEYS AT LAW
19 SOUTH MAIN STREET
TON RAPIDS, MICHIGAN
48827-1291
(517) 663-3306

Statement of Questions Involved

I. Whether Attorney General v Riley Is Not Binding Precedent Or Entitled To Stare Decisis

Plaintiff says: "Yes"

Defendant says: "No"

II. Whether Judge Clarke is Entitled to Retain His Seat Under the Rationale of *Kelley* v *Riley*

Plaintiff says: "Yes"

Defendant says: "No"

III. Whether *Attorney General* v *Riley* Was Incorrectly Decided and Should Be Repudiated

Plaintiff says: "Yes"

Defendant says: "No"

IV. Whether Article 6 §4 Allows the Michigan Supreme Court to Remove a Sitting Judge

Plaintiff says: "Yes"

Defendant says: "No"

JOLAN, THOMSEN
& VILLAS, P.C.
ATTORNEYS AT LAW
9 SOUTH MAIN STREET
ON RAPIDS, MICHIGAN
48827-1291
(517) 663-3306

INTRODUCTION

On December 20, 2010, Hugh Barrington Clarke, Jr. was appointed by Governor Jennifer Granholm to fill a vacancy on the 54-A District Court, arising from the appointment of the incumbent Judge, Amy Krause, to the Michigan Court of Appeals. On November 2, 2010, Judge Krause had been re-elected to serve as a judge of the 54-A District Court.

Attorney General, Bill Schuette, filed a Complaint for *Quo Warranto* on January 7, 2011, contending that Judge Clarke only had the right to serve on the 54-A District Court until noon on January 1, 2011. The Attorney General asserts that Judge Clarke's position as judge of the 54-A District Court terminated at that time and that Governor Rick Snyder had the right to appoint Judge Clarke's successor.

The Attorney General's Complaint for *Quo Warranto* is based on the decision of the Michigan Supreme Court in *Attorney General* v *Riley*, 417 Mich 119; 332 NW2d 353 (1983), which resulted in the ouster of Dorothy Comstock Riley as an associate justice of the Michigan Supreme Court. The Attorney General's case is fatally flawed for several reasons.

First, *Attorney General* v *Riley* is not even binding precedent. At most, only three of the justices agreed on the reasoning used in *Riley* with a fourth justice simply agreeing to the ouster.

Second, *Attorney General* v *Riley*, even if it were precedential, if anything, supports Judge Clarke's argument that his right to serve on the 54-A District Court does not end until January 1, 2013 (or longer if he is elected to the position in November,

OLAN, THOMSEN
& VILLAS, P.C.
ATTORNEYS AT LAW
9 SOUTH MAIN STREET
ON RAPIDS, MICHIGAN
48827-1291
(517) 663-3306

2012). The reasoning of the *Riley* plurality justices is applicable only to the office of Supreme Court justice and not to any of Michigan's lower judicial offices. This is because the result in *Riley* fundamentally turned on Mich Const 1963, Art 6, §2, which is only applicable to justices of the Michigan Supreme Court.

Third, the plurality justices' reasoning in *Riley* was, in any event, incorrect. To the extent it is deemed precedential, it should be overruled.

Fourth, Article 6, §4 does not allow the Court of Appeals or the Michigan Supreme Court to remove a sitting judge.

This Brief is filed in support the the Honorable Hugh Clarke's Emergency Application for Leave to Appeal to the Michigan Supreme Court. The Honorable Hugh Clarke will suffer irreparable harm if this matter is not decided immediately by the Michigan Supreme Court.

STATEMENT OF FACTS

Judge Clarke accepts the Statement of Facts set forth in the Attorney General's Brief In Support of Complaint for *Quo Warranto*. Judge Clarke would further state that a Answer to the Complaint for *Quo* Warranto, along with a supporting Brief was filed in the Michigan Court of Appeals on January 28, 2011 and served on the Plaintiff's Attorney for the Attorney General, Bill Schuette, on the same date. Along with those filings was filed a Response to the Plaintiff's Motion for Immediate Consideration, and a Motion to Bypass the Michigan Court of Appeals and to have this matter heard by the Michigan Supreme Court. Under these undisputed facts, Judge Clarke is entitled to dismissal of the Complaint for *Quo Warranto*.

NOLAN, THOMSEN
& VILLAS, P.C.
ATTORNEYS AT LAW
9 SOUTH MAIN STREET
ON RAPIDS, MICHIGAN
48827-1291
(517) 663-3306

STANDARD OF REVIEW

A. Standard for Writ of *Quo Warranto*

A writ of *quo warranto* is one of the extraordinary remedies, and somewhat similar to a writ of mandamus. *Sobocinski* v *Quinn,* 330 Mich 386, 389; 47 NW2d 655 (1951). This extraordinary writ does not lie against a Judge in the State of Michigan.

Judge Clarke submits that in any event he has a valid claim to the office of judge of the 54-A District Court until January 1, 2013.

B. Standard for Construing Constitutional Provisions

The Attorney General asserts that under the reasoning of three justices in *Attorney General* v *Riley*, 417 Mich 119; 332 NW2d 353 (1983), Judge Clarke is holding office as a district court judge in violation of Mich Const 1963, Art 6, §23. When a case turns on constitutional construction, the Court must attempt to divine the common understanding of the people who adopted the provision in issue. As then Justice Williams noted in *Traverse City School District* v *Attorney General*, 384 Mich 390, 405; 185 NW2d 9 (1971):

> "The primary rule is the rule of "common understanding" described by Justice Cooley:
>
> "A constitution is made for the people and by the people. *The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves would give it.* 'For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, *the intent to be arrived at is that of the people*, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, *but rather that they have accepted them in the sense most obvious to the common understanding*, and ratified the

OLAN, THOMSEN
& VILLAS, P.C.
ATTORNEYS AT LAW
9 SOUTH MAIN STREET
ON RAPIDS, MICHIGAN
48827-1291
(517) 663-3306

instrument in the belief that that was the sense designed to be conveyed.' (Cooley's Const Lim 81)". (Emphasis added.)

It is unreasonable to believe that the common understanding of the electorate which ratified amended Const 1963, Art 6, §23 - upon which the Attorney General's case for removal is premised - understood the amendment to preclude the legislature from enacting holdover language as part of the statutes governing the district courts.

ARGUMENT

I. *Attorney General* v *Riley* Is Not Binding Precedent Or Entitled To *Stare Decisis*

The Attorney General's Complaint for *Quo Warranto* is squarely premised on the notion that *Attorney General* v *Riley* is precedential and entitled to be given *stare decisis* effect. In fact, this is not the case. Decisions in which a majority of the justices agree on a result but not on the reasoning supporting that result are not binding precedent. See, *Rowland* v *Washtenaw County Road Commission*, 477 Mich 197, 206. footnote 7; 731 NW2d 41 (2007), in which the Supreme Court considered the precedential value of an opinion in a case in which five justices concurred in the result, but only three justices signed the lead opinion. The Court found that under the circumstances, the prior case was not binding precedent nor "an authoritative interpretation under the doctrine of *stare decisis*." See also, *Negri* v *Slotkin*, 397 Mich 105, 109; 244 NW2d 98 (1976) ("Plurality decisions in which no majority of the justices participating agree as to the reasoning are not an authoritative interpretation binding on the Court under the doctrine of *stare decisis*.")

OLAN, THOMSEN
& VILLAS, P.C.
ATTORNEYS AT LAW
9 SOUTH MAIN STREET
ON RAPIDS, MICHIGAN
48827-1291
(517) 663-3306

In *Riley* as originally decided, three justices, Chief Justice Williams and Justices Kavanagh and Cavanagh, writing three separate opinions, determined that Justice Riley should be ousted from her position as an associate justice of the Michigan Supreme Court. Justice Ryan, joined by Justice Brickley, issued a fourth opinion, opposing ouster, and Justice Levin wrote a fifth opinion, opposing ouster.

From the *Riley* case as officially reported, Chief Justice Williams' opinion appears first. Although Chief Justice Williams uses the word "we" in his opinion, there is nothing to indicate that any of the other justices specifically concurred with it. Justice Kavanagh's opinion for ouster was adopted by Justice Williams. See, 417 Mich at 159. Justice Cavanagh specifically concurred with the result reached by Justices Williams and Kavanagh, but not all of the other justices' reasoning.

On the Supreme Court's reconsideration of *Attorney General* v *Riley*, Justice Levin issued a second opinion, commencing at 417 Mich 218, which supported Justice Riley's ouster. Justice Levin did not adopt the reasoning of Justices Williams, Kavanagh or Cavanagh but instead found that because Justice Riley lacked four votes to continue on the Court, allowing her to retain her office should not be permitted. After reiterating the arguments for and against ouster, and noting that the other justices had not agreed with his idea that both Justice Riley and a Supreme Court justice appointed by Governor Blanchard should be seated, Justice Levin said:

> "Absent an adjudication by four justices favorable to Justice Riley's claim of authority, Justice Riley should not and cannot exercise the power of the office. Her participation in the work of this Court without an adjudication favorable to her claim would leave the question of the authority of her vote

NOLAN, THOMSEN
& VILLAS, P.C.
ATTORNEYS AT LAW
09 SOUTH MAIN STREET
ON RAPIDS, MICHIGAN
48827-1291
(517) 663-3306

> and of a decision of this Court in which she were to participate open to continuing dispute.
>
> "Because less than four votes were garnered for the view that Justice Riley's authority from and after January 1, 1983, should be recognized, a judgment of ouster, which could not properly be issued before consideration and determination of the separate question of the effect of the five opinions of the justices filed February 11, 1983, should now be issued."

417 Mich 221-223 (footnotes omitted).

Even if Justices Williams, Kavanagh, and Cavanagh can be said to have agreed on a rationale for Justice Riley's ouster, Justice Levin clearly did not agree with their reasoning. His reason for voting for ouster was evidently to avoid an institutional problem for the Supreme Court; he never renounced the reasoning of his original opinion. Thus, there was only a plurality of justices agreeing on rationale for the ouster, and *Attorney General* v *Riley* is not binding precedent.

The foregoing notwithstanding, should this Court conclude that it is bound by *Riley*, it nonetheless clearly does not compel the ouster of Judge Clarke. In fact, that reasoning actually supports the conclusion that *Riley* only applies to appointments of Supreme Court justices in light of the unique constitutional language setting out a Supreme Court justice's term of office in Mich Const 1963, Art 6, §2. Thus, the next argument addresses why Judge Clarke is entitled to retain his seat under the plurality rationale of *Riley*, and the third argument addresses why *Attorney General* v *Riley* was wrongly decided in any event.

NOLAN, THOMSEN
& VILLAS, P.C.
ATTORNEYS AT LAW
39 SOUTH MAIN STREET
TON RAPIDS, MICHIGAN
48827-1291
(517) 663-3306

II. Judge Clarke is Entitled to Retain His Seat Under the Rationale of *Kelley* v *Riley*

A. Riley Turned On the Lack of Holdover Language in Mich Const 1963, Art 6, §2 for Supreme Court Justices

The Attorney General misapprehends the plurality reasoning in *Riley* when he says at page 9 of his Brief in Support of Complaint for *Quo Warranto* that the plurality construed Const 1963, Art 6, §23 as prohibiting "an appointee from holding over from one term of office to another."[1]

In fact, the Supreme Court plurality only determined that Art 6, §23 did not provide authority for a Supreme Court justice appointed to fill a vacancy to hold office for both the remainder of the replaced justice's current elected term and to holdover to fill two years of the replaced justice's new elective term commencing on January 1st. The plurality justices would not have ousted Justice Riley but for Art 6, §2, which provides in pertinent part as follows:

> "The supreme court shall consist of seven justices elected at non-partisan elections as provided by law. The term of office shall be eight years and not more than two terms of office shall expire at the same time." (Emphasis supplied).

The plurality justices concluded that Art 6, §23, itself, did not contain language permitting holdover by Supreme Court justices, and, moreover, the emphasized phrase

[1] Art 6, §23 provides: "A vacancy shall occur in the office of judge of any court of record or in the district court by death, removal, resignation or vacating of the office, and such vacancy shall be filled by appointment by the governor. The person appointed by the governor shall hold office until 12 noon of the first day of January next succeeding the first general election held after the vacancy occurs, at which election a successor shall be elected for the remainder of the unexpired term. Whenever a new office of judge in a court of record, or the district court, is created by law, it shall be filled by election as provided by law. The supreme court may authorize persons who have been elected and served as judges to perform judicial duties for limited periods or specific assignments." (emphasis supplied).

JOLAN, THOMSEN
& VILLAS, P.C.
ATTORNEYS AT LAW
19 SOUTH MAIN STREET
TON RAPIDS, MICHIGAN
48827-1291
(517) 663-3306

from Art 6, §2, above, set a Supreme Court justice's term at eight years, without possibility of holdover. As to the significance of the lack of holdover language in §2 for Supreme Court justices. See, 417 Mich at 142 (Williams), 417 Mich at 165 (Kavanagh), and 417 Mich at 168-169 (Cavanagh).

In contrast to the term of office of Supreme Court justices, the plurality justices noted that holdover language **does** appear in the constitutional provisions setting forth terms of office for Court of Appeals judges (Art 6, §9), circuit court judges (Art 6, §12), and probate court judges (Art 6, §16). Indeed, Chief Justice Williams described these provisions as containing "traditional holdover language", namely that the terms of these judges were "six years and until their successors are elected and qualified."(emphasis supplied). 417 Mich at 142-43 (Williams). Chief Justice Williams, at the very least, strongly implied that had the vacancy involved a judge whose term of office included effective holdover language, it would have meant a different result. In concluding that ouster was required, Chief Justice Williams stated that Art 6, §2 and Art 6, §23 were *in pari materia* and had to be construed together to determine if Justice Riley's appointment held over beyond what would have been the starting date for Justice Moody's new term of office. Article 6, §23 would also be *in pari materia* with §§ 9, 12 and 16 of Article 6, and under Chief Justice Williams' rationale, the holdover language in these sections would have compelled a different result when they were construed together if *Riley* had involved an appointment to the Court of Appeals, a circuit court or a probate court.

NOLAN, THOMSEN
& VILLAS, P.C.
ATTORNEYS AT LAW
19 SOUTH MAIN STREET
TON RAPIDS, MICHIGAN
48827-1291
(517) 663-3306

Justice Thomas Giles Kavanagh also emphasized the lack of holdover language in Art 6, §2. He, too, compared the existence of such holdover language in the constitutional provisions for Court of Appeals judges, circuit court judges, and probate judges, to the lack of such language in Art 6, §2, and applied the doctrine of *expressio unius est exclusio alterius* in deciding that, in contrast to other judges, justices of the Supreme Court could not holdover. 417 Mich 165. Again, the strong implication is that had Art 6, §2 included holdover language, the result would have to have been different. (Certainly, the doctrine of *expressio unius est exclusio alterius* would have been irrelevant to his opinion.) Justice Kavanagh's reasoning that Art 6, §23 did not permit Justice Riley to serve beyond December 31, 1982, was fundamentally based on the lack of holdover language in Art 6, §2. Justice Kavanagh said in this regard:

> "An appointee's tenure cannot be unrelated to the scheme of eight-year terms of office established by Const 1963, Art 6, §2. Because a person's right to hold office can only have meaning in the context of terms, whether for years or life or determinable upon the happening of some contingency, the established terms of office set out in §2 are relevant to the meaning of §23. We find that §23 contemplates this and rather than carve out a term unrelated to the constitutional schedule of terms provides that a successor holds office for the remainder of the unexpired §2 term."

417 Mich at 162.

Finally, on the importance of the lack of holdover language in Art 6, §2, Justice Cavanagh said:

> "It is clear that the people of this state want an elected judiciary; they have consistently rejected any opportunity to adopt an appointed judiciary system. It is also clear that the people, by their adoption of Art 6, §2 of the 1963 Constitution, desired that an incumbent justice would not be permitted to remain in office beyond the expiration of his or her term without a renewed popular mandate."

417 Mich at 168.

JOLAN, THOMSEN
& VILLAS, P.C.
ATTORNEYS AT LAW
19 SOUTH MAIN STREET
TON RAPIDS, MICHIGAN
48827-1291
(517) 663-3306

In sum, it is clear that the primary problem with Justice Riley retaining her seat was the absence of holdover language in Art 6, §2. Without legally effective holdover language, the plurality justices did not believe the term of an appointed Supreme Court justice could extend into the new term for which the incumbent justice - who could not fill that term - had just been elected.

B. The Statutory Holdover Language for District Court Judges Does Not Conflict With Any Constitutional Provision Regarding Such Judge's Term Of Office

The district courts were not established in the Michigan Constitution. Instead, they were created legislatively in 1968, under the authority granted by Const 1963, Art 6, §1, to the legislature to establish courts of limited jurisdiction on a two-thirds vote.

The Michigan Constitution still contains no provision that purports to define a district court judge's term of office; this has always been accomplished through statute by virtue of constitutional delegation.

Terms of office for district court judges are set out in MCL 168.467i.[2] Since March 21, 1990, when 1990 PA 32 became effective, MCL 168.467i has included the "typical holdover" language, allowing district court judges to continue in office "until a successor is elected and qualified." Similarly, when Judge Clarke was appointed, MCL 168.467m(1), the provision which allows gubernatorial appointment of district court judges to fill vacancies, includes "typical holdover" language.[3]

[2] MCL 168.467i reads now and at the time of Judge Clarke's appointment: "Except as otherwise provided by law, the term of office for judge of the district court shall be 6 years, commencing at 12 noon on January 1 next following the judge's election and shall continue until a successor is elected and qualified." (Emphasis added).

[3] MCL 168.467m(1) is discussed in greater detail in Section C of this Argument.

JOLAN, THOMSEN
& VILLAS, P.C.
ATTORNEYS AT LAW
9 SOUTH MAIN STREET
ON RAPIDS, MICHIGAN
48827-1291
(517) 663-3306

As the Attorney General states, in her fight to retain her seat as an associate justice, Justice Riley relied on a 1955 statute, MCL 168.399, which included holdover language applicable to Supreme Court justices. This statutory provision was deemed ineffective by the plurality justices because they deemed it in conflict with Art 6, §2 which, again, sets an eight year term for justices and does not mention holdover. The Attorney General then makes the quantum leap that the district court statutes including holdover language are unconstitutional because they are in conflict with Art 6, §23! This assertion has nothing to do with the actual reasoning utilized by the plurality justices in finding MCL 168.399 to be unconstitutional, which was based on their belief that it conflicted with Art 6, §2 (which failed to include holdover language). In this regard, Chief Justice Williams wrote:

> "Where the Constitution has spoken, neither the Legislature (nor the Supreme Court for that matter) may amend the Constitution. *Pillon* v *Attorney General*, 345 Mich 536; 77 NW2d 257 (1956).
>
> "Section 2 of Art 6 of the 1963 Constitution definitely fixed the term of office for Supreme Court justices at eight years. Therefore, it is not within the power of the Legislature or this Court to amend the Constitution by annexing a holdover term. Section 2 sets forth a definite term of years, and so it must remain until altered by the people through constitutional amendment."

417 Mich at 145. See also, finding only a conflict between MCL 168.399 and Const 1963, Art 6 §2, 417 Mich at 164-165 (Justice Kavanagh) and 417 Mich at 168 (Justice Cavanagh). It is simply untrue (as detailed below) - the claim of the Attorney General notwithstanding - that MCL 168.399 was found by the plurality justices to be in conflict with Art 6, §23.

NOLAN, THOMSEN
& VILLAS, P.C.
ATTORNEYS AT LAW
9 SOUTH MAIN STREET
RON RAPIDS, MICHIGAN
48827-1291
(517) 663-3306

In this case, there is no constitutional provision that sets forth the term of office for district judges. Thus, there is nothing in the statutes which define such term of office - MCL 168.467i and MCL 168.467m - with which the Michigan Constitution is in conflict. In short, the statutes define the term of office for district court judges because the Constitution does not address the term of office for a district court judge. This is not surprising as district courts did not exist in 1963! There is no statutory conflict with the Constitution, let alone a conflict that would overcome the presumption of constitutionality afforded statutes. It is, of course, the duty of the courts to construe a statute as constitutional unless its unconstitutionality is readily apparent. *Taylor* v *Smithkline Beecham Corp*, 468 Mich 1, 6; 658 NW2d 127 (2003), *Kenderick* v *City of Battle Creek*, 284 Mich App 653, 654-55; 774 NW2d 925 (2009).

The existence of a statutory provision addressing a subject is not unconstitutional where, as here, the Constitution is silent on that subject. Or, as arguable in this instance, expressly delegates that responsibility to the legislature, per Const 1963, Art 6, §1.

C. The Holdover Language of MCL 168.467i and MCL 168.467m Does Not Conflict With Art 6, §23

Again, the plurality justices in *Riley* did not say that the language of MCL 168.399 - providing for Supreme Court holdover - was unconstitutional because it conflicted with Art 6, §23. The Attorney General has never clearly articulated precisely how the holdover language in the statutes addressing the terms of district court judges conflict with Art 6, §23. Nonetheless, the Attorney General argues that MCL 168.467i and MCL

NOLAN, THOMSEN
& VILLAS, P.C.
ATTORNEYS AT LAW
119 SOUTH MAIN STREET
TON RAPIDS, MICHIGAN
48827-1291
(517) 663-3306

168.467m - both of which contain holdover language - are unconstitutional because of Art 6, §23.

As to Const 1963, Art 6, §23, the *Riley* plurality justices concluded that, considered on its own, it could be interpreted as permitting Supreme Court justices to holdover, although it did not unambiguously lead to this conclusion. See, *e.g.*, 417 Mich at 145-146 (Williams). Indeed, it was due to the uncertainty as to how Art 6, §23 should be construed that the plurality justices looked at Art 6, §2 (and the constitutional provisions concerning terms of office for judges of the Court of Appeals, circuit court judges and probate court judges) in deciding that Supreme Court justices had no right of holdover.

Prior to 1968, Art 6, §23, did not mention district courts, which did not then exist. As detailed in *Riley*, in 1968, the 1963 Constitution was amended to restore gubernatorial appointment to fill judicial vacancies. On August 6, 1968, the people ratified constitutional amendments proposed by PA 1968, HSR, No. F. The ballot proposal as presented to the electorate read:

> "PROPOSAL 3
>
> "Proposed amendments to the State Constitution relating to the filling of judicial vacancies and extend existing constitutional provisions to appointed judges.
>
> "The proposed amendments to Section 20, 22, 23 and 24 of Article 6 of the State Constitution would do the following"
>
> "1. Vacancies in the office of judge of courts of record or district courts would be filled by the governor until January first following the next general election.
>
> "2. Extend existing constitutional provisions to appointed judges.

JOLAN, THOMSEN
& VILLAS, P.C.
ATTORNEYS AT LAW
9 SOUTH MAIN STREET
ON RAPIDS, MICHIGAN
48827-1291
(517) 663-3306

"Shall the state constitution be amended to provide that the governor shall fill judicial vacancies and to extend existing constitutional provisions to appointed judges?

Yes

No"

In 1968, when the Constitutional amendment to §23 reinstated gubernatorial appointment of persons to fill judicial vacancies, MCL 168.467m provided for the Supreme Court to authorize persons who had served as judges to perform the duties of a district court judge when a vacancy arose,[4] tracking Art 6, §23 as it was ratified in 1963. Thereafter, in 1970, MCL 168.467m was amended to conform to the 1968 amendment to Art 6, §23 and permit the governor to fill vacancies arising in the district court. As is pertinent, MCL 168.467m(1) now reads:

"(1) If a vacancy occurs in the office of district judge, the governor shall appoint a successor to fill the vacancy. Except as otherwise provided in section 467c(4), the person appointed by the governor shall be considered an incumbent for purposes of this act and shall hold office until 12 noon of January 1 following the next general November election at which a successor is elected and qualified."

The only significance to adding the reference to district court judges in Art 6, §23 in 1968 was to constitutionally permit the governor to fill vacancies in the district court, just as the amendment permitted gubernatorial appointment for judges of the Supreme Court, Court of Appeals, circuit courts and probate courts. Given the wording of the ballot proposal, it is impossible to conclude that the common understanding of the people who adopted the 1968 amendment to Art 6, §23 was that it had anything to do with

NOLAN, THOMSEN
& VILLAS, P.C.
ATTORNEYS AT LAW
19 SOUTH MAIN STREET
RON RAPIDS, MICHIGAN
48827-1291
(517) 663-3306

[4] MCL 168.467m read in pertinent part at that time: "Whenever a vacancy shall occur in the office of district judge, the supreme court may authorize persons who have served as judges of any court of record in this state to perform judicial duties of such office from the time of the occurrence of the vacancy until the successor is elected and qualified."

judicial holdovers. See, *Traverse City School District, supra.* The amendments simply were not motivated by any controversy involving judicial holdover but, rather, they were adopted to restore the gubernatorial appointment power to fill vacancies to those courts that was eliminated in the 1963 Constitution and, for the first time, to provide constitutionally for gubernatorial appointment power to fill vacancies in the district courts.

Art 6, §23 does not prohibit judicial holdover. At most, Art 6, §23 is silent on the question of holdover. Once again, because there is no constitutional prohibition against a district court judge holdover when a vacancy arises in such court, there is no basis except constitutional silence on which to find the holdover language of MCL 168.467i ineffective. Finding statutory language void on the grounds that the Constitution is silent on the subject covered by the statute would be to totally ignore the well-established doctrine that the power to declare a law unconstitutional should be exercised with extreme caution and never where serious doubt exists with regard to the conflict. *Council of Organizations and Others for Education About Parochiaid, Inc.* v *Governor,* 455 Mich 557, 570; 566 NW2d 208 (1997). *By Lo Oil Co.* v *Dep't of Treasury*, 267 Mich App 19, 36; 703 NW2d 822 (2005).

Statutes are presumed constitutional, and we exercise the power to declare a law unconstitutional with extreme caution. "Every reasonable presumption or intendment must be indulged in favor of the validity of an act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the

NOLAN, THOMSEN
& VILLAS, P.C.
ATTORNEYS AT LAW
39 SOUTH MAIN STREET
TON RAPIDS, MICHIGAN
48827-1291
(517) 663-3306

Constitution that a court will refuse to sustain its validity." *Phillips v Mirac, Inc.*, 470 Mich 415, 422; 685 NW2d 174 (2004) quoting *Cady v* Detroit, 289 Mich 499, 505; 286 NW 805 (1939).

MCL 168.467i was amended in 1990 and MCL 168.467m was amended in 1990 and 1999 subsequent to the Supreme Court's Opinion in *Kelley.* The Legislature was aware of the holdover provision of MCL 168.467i, and the 1983 Supreme Court Opinion in *Kelley* and chose not to remove the holdover provision in MCL 168.467i when it amended this statute in 1990. The Legislature is presumed to be aware of judicial interpretations of existing law. *Ford Motor Co. v Woodwaxen*, 475 Mich 425, 439; 716 NW2d 247 (2006). Accordingly, the Michigan Legislature wanted District Court Judge's terms to retain this holdover provision.

Here, there is effective statutory holdover language under which Judge Clarke is entitled to serve on the 54-A District Court until January 1, 2013.

D. <u>This Case Is Controlled By 150 Year Old Precedent</u>

The appointment of Judge Clarke presents a scenario which is amazingly similar to *People ex rel Andrews* v *Lord*, 9 Mich 227 (1861). In *Lord*, following the death of incumbent Oakland County probate judge, Oscar North, Jacob Van Valkenburgh was appointed by Governor Moses Wisner in November 1860 to take Judge North's office. Judge North had been re-elected to serve another term of office commencing on January 1, 1861. For whatever reasons, Governor Wisner then appointed Henry Lord to the "new" term of office beginning on January 1, 1861. In April, 1861, a third person, Henry

NOLAN, THOMSEN
& VILLAS, P.C.
ATTORNEYS AT LAW
9 SOUTH MAIN STREET
ON RAPIDS, MICHIGAN
48827-1291
(517) 663-3306

Andrews, was elected to the office. At this point, Lord, and not Van Valkenburgh was holding the office. Lord argued that under an 1857 statute, he had the right to continue in the office, despite the election of Andrews. The unanimous Supreme Court declined to address the statutory issue, finding that Lord never had the right to hold the office of probate judge. In so holding, the Court stated:

> "It is not disputed that Van Valkenburgh's appointment was valid, but it is claimed by Lord that his appointment was revocable, and was revoked by the appointment of the latter.
>
> "It is also claimed that, whether revocable or not, it had determined, and left a vacancy to be filled by appointment.
>
> "The constitution provides that the judge of probate shall be elected, and shall hold his office for four years, and *"until a successor is elected and qualified."* In case of vacancy, the governor is to appoint a person to continue *"until a successor is elected and qualified. When elected, such successor shall hold his office the residue of the unexpired term."*
>
> "These provisions are so free from ambiguity that there is no room left for construction. A person appointed to fill a vacancy can only be superseded by one who is duly *elected,* and holds in the same manner as if originally the incumbent until thus superseded. His term of office did not expire on the first day of January, 1861, unless some one elected and qualified was then ready to take the office. As Mr. North was re-elected, and was then dead, the election had then fallen through."

9 Mich at 229-230.

The holding of *Lord* is directly applicable to the appointment of Judge Clarke. Under MCL 168.467m, once he was appointed by the governor, Judge Clarke holds "office until 12 noon of January 1 following the next general election at which the successor is elected and qualified," i.e. until January 1, 2013. As in *Lord*, there is no ambiguity about Judge Clarke's right to serve until there is another election for his office. As the "person appointed to fill a vacancy" he holds the office "in the same manner as if

OLAN, THOMSEN
& VILLAS, P.C.
ATTORNEYS AT LAW
9 SOUTH MAIN STREET
ON RAPIDS, MICHIGAN
48827-1291
(517) 663-3306

originally the incumbent", and the incumbent would be entitled under MCL 168.467i to holdover "until a successor is elected and qualified."

In seeking to diminish the import of *Lord,* the Attorney General seizes upon a distinction made by Chief Justice Williams between the facts presented there and the facts surrounding Justice Riley's appointment, namely, that the 1850 Constitution (in effect when *Lord* was decided) included holdover language in both the provision setting the probate judge's term of office (Const 1850, Art 6, §13) and in the provision allowing gubernatorial appointment of a successor (Const 1850, Art 6, §14) while, in contrast, as respects Justice Riley, Const 1963, Art 6, §2, included no holdover language and, in the opinion of the plurality justices, neither did Art 6, §23. It is apparently the Attorney General's position that, because the 1963 Constitution contains no holdover language for district court judges - even though district courts did not exist in 1963 and were created legislatively – there is a "conflict" with Art 6, §23, and Judge Clarke's term of office ended on December 31, 2010.

Chief Justice Williams explicitly said in *Riley* in connection with his discussion of *Lord* that it was the absence of holdover language establishing the term of office for Supreme Court justices (Art 6, §2) that was critical to the decision that Justice Riley could not holdover - not the absence of such language in the vacancy-filling position (Art 6, §23). After noting that the *Lord* analysis is "typical" when the appointee's term includes a holdover provision, Chief Justice Williams stated:

> "The result will also be achieved if the vacancy-filling provision does not specify a duration for the appointee's term, but the incumbent's term of

NOLAN, THOMSEN
& VILLAS, P.C.
ATTORNEYS AT LAW
9 SOUTH MAIN STREET
ON RAPIDS, MICHIGAN
48827-1291
(517) 663-3306

> office includes a holdover provision. The holdover language ensures that a vacancy will not occur merely by expiration of the term of office; an officer holds office until his elected successor replaces him. In the *Lord* case, holdover language appeared in both sections of the Constitution; in the present case it appears in neither."

417 Mich 136.

Here, of course, the very statute that created the district courts now includes holdover language in the provision establishing the term of office for district court judges, MCL 168.467i. The Attorney General fails to show how this statutory provision conflicts with Art 6, §23 or any other section of the Constitution.

In any event, here, as in *Lord*, there is effective holdover language both in the statutory provision setting the term of office, MCL 168.467i (which is enough in Chief Justice Williams' view) but, moreover, in the statutory provision providing for the filling of vacancies, MCL 168.467m. Because holdover language for district court judges is included in MCL 168.467i (defining the term of office) and because this provision does not conflict with anything in the 1963 Constitution, Judge Clarke is clearly entitled to hold office as specified in MCL 167.467m, namely, until 12 noon on January 1, 2013.

E. It Would Be Absurd to Oust Judge Clarke on the Hypothetical Ground that Art 6, §23 Could Be Construed to Allow an Appointed District Court Judge to Holdover and Usurp a Newly Elected District Court Judge

Relying on a hypothetical case described in the opinion of Chief Justice Williams in *Riley* the Attorney General asserts that Judge Clarke's appointment must be deemed to have terminated on December 31, 2010, to avoid the injustice that an appointed district

NOLAN, THOMSEN
& VILLAS, P.C.
ATTORNEYS AT LAW
9 SOUTH MAIN STREET
ON RAPIDS, MICHIGAN
48827-1291
(517) 663-3306

court judge could someday usurp the office from a newly elected judge given the second sentence of Art 6, §23, which provides:

> "The person appointed by the governor shall hold office until 12 noon of the first day of January next succeeding the first general election held after the vacancy occurs, at which election a successor shall be elected for the remainder of the unexpired term.

With respect to this provision, Chief Justice Williams noted:

> "Under a holdover reading of this language, if defendant had been *elected* to succeed Justice Moody and had Justice Moody died prior to January 1, the Governor's appointee would have displaced the defendant from an office to which she had been duly elected. Obviously, this result-which permits divesting a duly elected officer of his or her office-is repugnant to the common understanding of the people who ratified the Constitution.
>
> "Additionally, this absurd result would not materialize if § 23 contained traditional holdover language. Under a holdover analysis, an appointee's term ends when an *elected* officer steps forward to claim the office. Under traditional holdover language, it is irrelevant whether the election which grants the successor his right to office occurs before or after the vacancy occurs."

417 Mich at 146-147.

Judge Clarke agrees that the result of an appointed judge usurping the office of an elected judge would be absurd – no matter on which Michigan court the newly elected judge was chosen to serve – and agrees, as Chief Justice Williams noted, this would be "repugnant to the common understanding of the people." The notion that an appointed justice would be entitled to usurp an elected justice under Art 6, §23 requires applying the second sentence of Art 6, §23 with a wooden literalness to a situation obviously not contemplated by the drafters of the 1968 amendments to Art 6, §23, ignores evidence that

NOLAN, THOMSEN
& VILLAS, P.C.
ATTORNEYS AT LAW
119 SOUTH MAIN STREET
TON RAPIDS, MICHIGAN
48827-1291
(517) 663-3306

this result was not intended by the citizenry, and requires refusing to give effect to MCL 168.404.[5]

The Convention Comment to Art 6, §23, which removed gubernatorial appointment of judges, expressly states that its purpose was to promote an elected judiciary:

> "This section is a revision of Sec. 20, Article VII, of the present [1908] constitution. It provides that vacancies in the office of an elected judge of any court of record shall be filled by a general or special election. This is a significant change and removes from the governor the power to appoint judges to fill vacancies.
>
> "The change is made in order to maintain consistency in the idea that this state should have an elected judiciary. The present system of appointment by the governor to fill vacancies, bestowing on the appointee the incumbency designation, had has an overwhelming tendency to insure the lection of the appointee. This has created in effect an appointive judiciary.
>
> "The section also provides that the supreme court may fill judicial vacancies temporarily by utilizing the services of judges who have retired. These temporary appointees will not be eligible for lection to fill the vacancy."

Yet, in the ultimate construction of Art 6, §23, as it relates to Supreme Court justices, Chief Justice Williams completely abandons the notion that constitutional provisions are to be interpreted in accord with the common understanding of the people. To avoid the absurdity of an appointed justice holding over into a newly elected justice's term, Chief Justice Williams construes Art 6, §23 as permitting two successive appointments, arising from one vacancy. Given that Art 6, §23 refers to a single

[5] Indeed, Chief Justice Williams' extended discussion of the possible appointment of a justice, who then usurps a newly elected justice, actually undercuts his entire opinion. Significantly, Justice Kavanagh never advances this hypothetical concern raised by the Chief Justice. Justice Cavanagh does note, in passing only, this "possibility". 417 Mich at 169.

JOLAN, THOMSEN
& VILLAS, P.C.
ATTORNEYS AT LAW
9 SOUTH MAIN STREET
ON RAPIDS, MICHIGAN
48827-1291
(517) 663-3306

appointment and says nothing about successive appointments, what reasonable citizen would understand that this is what Art 6, §23 meant?

Significantly, at the time of Justice Riley's appointment, an existing statute precluded the result imagined by Chief Justice Williams. In 1963, MCL 168.404, which deals with filling vacancies on the Supreme Court, was amended to conform to newly adopted Art 6, §23, (*i.e.*, providing for the Supreme Court to authorize a former judge to serve as a justice). At this time, the statute also provided:

> "The candidate receiving the highest number of votes for said office and who has subscribed to the oath as provided in Section 1 of Article II of the state Constitution shall be deemed to be elected and qualified, even though a vacancy occurs prior to the time he shall have entered upon the duties of his office."

Following the 1968 constitutional amendments in 1970, MCL 168.404 was again amended, this time to reflect the right of gubernatorial appointment of Supreme Court justices to fill vacancies. The last two sentences of MCL 168.404, quoted above, were not changed. Justice Williams acknowledged the existence of MCL 168.404 and found that it was adopted to recognize "the people's clearly expressed preference for *elected* justices." 417 Mich 147. Instead of simply recognizing that MCL 168.404 addressed his absurd hypothetical such that it could not occur, Justice Williams uses MCL 168.404 to conclude that two vacancies arose from Justice Moody's death – the first when he died and the second occurring on January 1, 1983 – giving Governor Blanchard the right to appoint a Supreme Court justice at that time. 417 Mich at 157-158. What this reasoning ignores is that the quoted language of MCL 168.404 would have been totally unnecessary

JOLAN, THOMSEN
& VILLAS, P.C.
ATTORNEYS AT LAW
9 SOUTH MAIN STREET
ON RAPIDS, MICHIGAN
48827-1291
(517) 663-3306

if the legislature had believed that a Supreme Court justice appointed to fill a vacancy arising in one elected term of the incumbent could not holdover to continue to fill that vacancy in the incumbent's newly elected term.

It is impossible to believe that any court applying Michigan law would ever hold that a judge appointed to fill a vacancy had the right to continue in that office even after another qualified person had been elected to assume that office. Admittedly, a foolishly literal construction of Art 6, §23, by itself, could permit this result.

Also admittedly, MCL 168.467m(1), the vacancy-filling provision relating to district court judges, provides for such appointed judges to hold office, like Art 6, §23 "until 12 noon of January 1 following the next general November election at which a successor is elected and qualified." Thus, it could be claimed that Justice Williams hypothetical about an appointed district court judge usurping an elected judge could come to pass.[6] This analysis, however, would have to ignore MCL 168.467i, which provides for a district court judge's term of office.[7] Construing MCL 168.467i and MCL 168.467m(1) together, however, leads to the inexorable conclusion that the new person elected to fill the seat that became vacant after the election date, has the exclusive right to assume office "at 12 noon on January 1 next following the judge's election." This result is required by the judicial obligation to construe seemingly conflicting statutes so that they operate in harmony as a unified whole *Cain* v *Waste Management, Inc.*, 472 Mich

NOLAN, THOMSEN
& VILLAS, P.C.
ATTORNEYS AT LAW
19 SOUTH MAIN STREET
RON RAPIDS, MICHIGAN
48827-1291
(517) 663-3306

[6] Looking just at Art 6, §23, it could also come to pass for judges of the Court of Appeals, circuit court judges and probate judges.

[7] It would also mean ignoring Art 6, §9 for Court of Appeals judges, Art 6, §12 for circuit court judges, and Art 6, §16 for probate court judges.

236, 259; 697 NW2d 130 (2005) and to avoid "whimsical and arbitrary" results, *Wyandotte Savings Bank* v *State Banking Commissioner*, 347 Mich 33, 45; 78 NW2d 612 (1950).

F. Summary of Argument

Even if *Riley* were precedential – which it is not – Judge Clarke's right to office is not controlled by *Riley*. The decision of the plurality justices in *Riley* to oust her from office was fundamentally based on the absence of effective holdover language in the 1963 Michigan Constitution or statute.

As to the Constitution, Art 6, §2 simply provides for an eight year term for justices without the "typical holdover" language that the term continues "until a successor is elected and qualified." The plurality justices in *Riley* further rejected the argument that Art 6, §23 provided such holdover language. Finally, the plurality justices found statutory holdover language in MCL 168.399 to be unconstitutional because they believed the holdover language conflicted with Art 6, §2.

The district courts were created by statute – not the Constitution – and the Constitution does not address the term of office for district court judges. Instead, logically enough, the Legislature has defined the term of office by statute. Under MCL 168.467i, the term is 6 years commencing on January 1st following the election and continuing "until a successor is elected and qualified." In short, MCL 168.467i contains "typical holdover" language. Since the Michigan Constitution does not purport to define

JOLAN, THOMSEN
& VILLAS, P.C.
ATTORNEYS AT LAW
9 SOUTH MAIN STREET
ON RAPIDS, MICHIGAN
48827-1291
(517) 663-3306

the term of office for district court judges, this holdover language does not conflict with the Constitution and is fully effective.

Although the Attorney General asserts that the statutory holdover language conflicts with Art 6, §23 as interpreted by the plurality justices in *Riley*, this argument misapprehends the reasoning of the plurality justices, which was simply that Art 6, §23, itself, could not be construed to contain holdover language - not that Art 6, §23 prohibited a holdover where holdover was otherwise authorized in law. Here, holdover is authorized in the statutes that govern the district court.

Attorney General v *Riley* poses no obstacle to Judge Clarke's continued service on the 54-A District Court.

III. ***Attorney General* v *Riley* Was Incorrectly Decided and Should Be Repudiated**

As argued previously, *Attorney General* v *Riley* is not binding precedent. Moreover, even if it were binding, it supports Judge Clarke's right to continue as a judge of the 54-A District Court until January 1, 2013, rather than compel his ouster. In any event, the reasoning of the plurality justices in *Riley* was flawed, and *Riley* should be repudiated. Should this Court chose to reject the plurality rationale in *Riley*, the Attorney General's case that Judge Clarke must be removed from his office sinks like an edifice on a foundation of quicksand.

A. Article 6, §23 of the Michigan Constitution Contains Holdover Language

Contrary to the reasoning of the plurality justices in *Riley*, Const 1963, Art 6, §23 most certainly contains holdover language. That sentence reads:

OLAN, THOMSEN
& VILLAS, P.C.
ATTORNEYS AT LAW
9 SOUTH MAIN STREET
ON RAPIDS, MICHIGAN
48827-1291
(517) 663-3306

> "The person appointed by the governor shall hold office until 12 noon of the first day of January next succeeding the first general election held after the vacancy occurs, at which election a successor shall be elected for the remainder of the unexpired term."

This sentence is, quite simply, holdover language applicable to gubernatorial appointees to judicial office. Under the plain language of this sentence, an appointed judge's term of office runs until January 1st of the election at which a successor is chosen for the remainder of the unexpired term. In Judge Clarke's case, this means that he has the right to serve until January 1, 2013.

In the case of Judge Clarke, as well as Justice Riley, this holdover language can be applied with no problem whatsoever. Instead of recognizing this simple fact, the plurality justices elected to consider another case which was factually different than the circumstances surrounding Justice Riley's appointment and the appointment of Judge Clarke. Specifically, the plurality justices focused on the impact of Art 6, §23, in a fact pattern not before them, namely, the extent to which Art 6, §23 would be applicable where a vacancy arose in a judicial office held by an incumbent in the final months of that incumbent's term, the governor appointed a replacement for such incumbent, and somebody new was elected in the November election to serve as a judge beginning January 1st. In this scenario, two obvious choices present themselves: (1) applying Art 6, §23 with a wooden literalness and concluding that the appointee gets to continue in office after January 1st following the November election even though somebody else was elected to fill that term or (2) concluding that despite the literal language of Art 6, §23, the person elected in November to the judicial post gets to assume office on January 1st.

NOLAN, THOMSEN
& VILLAS, P.C.
ATTORNEYS AT LAW
39 SOUTH MAIN STREET
TON RAPIDS, MICHIGAN
48827-1291
(517) 663-3306

The plurality justices adopted a less obvious alternative, namely, concluding that the second sentence of Art 6, §23 does not contain holdover language such that, in the absence of effective holdover language elsewhere in law, an appointed justice's term of office expires at the end of the incumbent justice's current elective term, and that the governor at the time of the new judicial term gets to appoint another replacement for the first two years of that term.[8]

The rationale offered for this conclusion is the use of the phrase "unexpired term" in the second sentence of Art 6, §23. All of the plurality justices concluded that "unexpired term" means the remaining term of office which is left at the time the vacancy occurs.

Maybe the plurality judges' construction would have been justified if it actually permitted Art 6, §23 to be applied as literally written, but it does not. As dissenting Justice Ryan noted in his dissection of the language of Art 6, §23:

> "My colleagues for ouster also accept the Attorney General's argument that the following language of §23 is somehow inconsistent with an appointee serving until after the next general election:

[8] This conclusion was reached to address the case not before the *Riley* Court, namely, what happens if there is an appointment to fill a judicial vacancy arising in one election cycle, but a new person is elected to the judgeship in the next election cycle. Chief Justice Williams acknowledges that this interpretation could result in a governor being able to replace his or her first appointed judge. 417 Mich at 148-149. As Chief Justice Williams indicates, this approach does not decrease the number of elected judges, but it does have the potential for injecting politics into the judicial process, which he acknowledges. If an incumbent judge vacates an office by death or otherwise in the months just before the election, it may be that the appointed judge would serve four or more months before the term commencing on January 1st following the new election cycle begins. Surely, this would present an opportunity for a governor not satisfied with some decision(s) of his/her appointee to appoint somebody new effective on the January 1st marking the beginning of the new elective term. It might also cause an appointed judge to decide a case(s) differently than he/she thought appropriate to ensure reappointment.

NOLAN, THOMSEN
& VILLAS, P.C.
ATTORNEYS AT LAW
19 SOUTH MAIN STREET
RON RAPIDS, MICHIGAN
48827-1291
(517) 663-3306

> 'The person appointed by the governor shall hold office until 12 noon of the first day of January next succeeding the first general election held after the vacancy occurs, at which election a successor shall be elected *for the remainder of the unexpired term*.' (emphasis added).
>
> "It is argued that the emphasized language nullifies the plain English of the clause which goes before it, if the "term" in which the appointee's predecessor was serving expires before the next general election will be held.
>
> "That argument is unsound on two grounds:
>
> "The first is that the provision simply does not say what the Attorney General claims it means. It does not say that the person appointed shall hold office until January 1 next succeeding the first general election held after the vacancy occurs, *or until the expiration of the current term, whichever first occurs.* It might have said that, and, if the framers of §23 intended that result, they undoubtedly would have said that or something like it. Certainly, had they intended §23 to mean what the Attorney General and my colleagues say it means, they could not have obfuscated such meaning behind more abstruse or opaque language. A commonsense reading of §23 simply does not produce from the words which appear there the strained and imaginative meaning suggested."

417 Mich at 179-180.

Later, Justice Ryan noted how the plurality's reasoning actually conflicts with rules of grammar, noting:

> "The phrase, "unexpired term", refers to the regular eight-year cycle or term in which an appointee under §23 is serving at the time his or her "successor shall be elected". Both a common-sense understanding of the whole of §23, and traditional rules of grammatical construction, demonstrate that the prepositional phrase "for the remainder of the unexpired term" modifies and defines the immediately antecedent phrase, "a successor shall be elected" and, in doing so, describes the duration for which the successor is elected."

417 Mich 181-182.

OLAN, THOMSEN
& VILLAS, P.C.
ATTORNEYS AT LAW
9 SOUTH MAIN STREET
ON RAPIDS, MICHIGAN
48827-1291
(517) 663-3306

It is impossible to believe that the "common understanding" of the people who ratified Art 6, §23 as amended in 1968, was the convoluted construction given to the provision by the plurality justices. As Justice Ryan pointedly (and accurately) wrote:

> "Can it be fairly said that, in ratifying §23, the "great mass of the people" had in mind the strained meaning suggested by the Attorney General, including the conditioning and qualifying clause he must necessarily read into it, and that such meaning is "most obvious to the common understanding of the people"? To as the question is to answer it. A meaning of §23 more "dark [and] abstruse" than that suggested would be difficult to conjure."

417 Mich at 181.

The logical conclusion to reach as to why Art 6, §23 was written as it was is that the drafters did not consider the possibility of an appointment, followed by an entirely different person being elected to fill the appointee's vacancy created in the last months of the incumbent judge's current elected term. As such, it is not plausible that the common understanding of the people would be that two appointments would be allowed under Art 6, §23, to fill the same office so as to cover this hypothetical situation. There is simply nothing in §23 that suggests multiple appointments to the same judicial office were intended – the section uses the singular term "appointment".

In *Riley*, the grammatical and linguistic gymnastics of the plurality justices were simply unnecessary to avoid what all of the justices agreed would have been an absurd result, namely, an appointed justice being permitted to usurp the position of an elected justice. Article 6, §2 of the Michigan Constitution provides that the elective terms of a Supreme Court justice is eight years, and the elections will be "as provided by law". The

NOLAN, THOMSEN
& VILLAS, P.C.
ATTORNEYS AT LAW
39 SOUTH MAIN STREET
TON RAPIDS, MICHIGAN
48827-1291
(517) 663-3306

Election Code sets forth the specifics of the timing of elections for Supreme Court justices. MCL 168.396. Surely, the plurality justices in applying the doctrine of *in pari matera*, to construe §2 and §23 together could have easily determined that the holdover sentence in Art 6, §23 was simply inapplicable when a new justice had been elected in accord with Art 6, §23 and the applicable statutes to serve the new elective term commencing on the January 1st following the year in which the vacancy occurred. This approach would also have avoided the absurdity of an elected justice being usurped by an appointed justice, and would not have required the contorted reading of Art 6, §23 as permitting two successive appointments to fill the same vacancy. More fundamentally, this would undoubtedly have been the "common understanding" of the people as to what would and should happen if confronted with the facts of a Supreme Court vacancy occurring in one elective term, where somebody other than the incumbent who had vacated the office was elected to assume the position of Supreme Court effective January 1st.

In fact, it would not even have been necessary to conclude that §2 created an exception to the holdover language in §23 to avoid the absurdity of an appointed justice usurping an elected justice because of MCL 168.404 which, at the time of *Riley,* provided:

> "Whenever a vacancy shall occur in the office of justice of the Supreme Court, the governor shall appoint a successor to fill the vacancy. The person appointed by the governor shall be considered an incumbent for purposes of this act and shall hold office until 12 noon of January 1 following the next general election at which a successor is elected and qualified. At the next general November election held at least 90 days after

OLAN, THOMSEN
& VILLAS, P.C.
ATTORNEYS AT LAW
9 SOUTH MAIN STREET
ON RAPIDS, MICHIGAN
48827-1291
(517) 663-3306

such vacancy shall occur, a person, nominated under section 392, shall be elected to fill such office, and the person so elected shall hold such office for the remainder of the unexpired term. A candidate receiving the highest number of votes for said office and who has subscribed to the oath as provided in section 1 of Article 11 of the state constitution shall be deemed to be elected and qualified, even though a vacancy occurs prior to the time he shall have entered upon the duties of his office. (Emphasis supplied).[9]

Objection may be made that the emphasized sentence from MCL 168.404 conflicts with Art 6, §23 so is itself unconstitutional, to which Judge Clarke responds how can a statutory provision that avoids a result that all Supreme Court justices agree would be absurd under the Michigan Constitution, namely, an appointed justice depriving an elected justice of his or her term of office, be deemed unconstitutional?

In short, the second sentence of Art 6, §23 was surely understood by the people who ratified the amendments to this section in 1968 to be a holdover provision. As all of the justices in *Riley* agreed, the Michigan Constitution contemplates an elected judiciary, and appointed judges are the exception, with the appointments of limited duration. Under these circumstances, MCL 168.404 clearly promotes a constitutional principle embodied in the Michigan Constitution. Rather than conflict with Art 6, §23, MCL 168.404 merely supplements it, and works to eliminate the possibility of the hypothetical the *Riley* plurality justices denounced as absurd ever coming to fruition.

Again, while Judge Clarke submits that the outcome in *Riley* was incorrect, this Court need not formally repudiate it for Judge Clarke to be entitled to dismissal of the Complaint for Quo Warranto. The holdover language in the district court statutes simply

[9] The critical sentence is now embodied in MCL 168.404(3).

OLAN, THOMSEN
& VILLAS, P.C.
ATTORNEYS AT LAW
9 SOUTH MAIN STREET
ON RAPIDS, MICHIGAN
48827-1291
(517) 663-3306

does not conflict with the Michigan Constitution because the Michigan Constitution is generally silent on district courts and, specifically, on the terms of office of district court judges.

B. Statute In Effect at the Time *Attorney General* v *Riley* was Decided Provided That Supreme Court Justices Could Holdover

Although Art 6, §2 clearly does not contain holdover language, and although the plurality justices concluded (albeit incorrectly) that the second sentence of Art 6, §23 was not a holdover provision, at the time *Riley* was decided, MCL 168.399 clearly did use "typical holdover" language applicable to Supreme Court justices. This provision reads:

> "The term of office of justice of the supreme court shall be 8 years, beginning on the first day of January next following the election and shall continue until a successor is elected and qualified."

The plurality justices in *Riley* concluded that the statutory holdover language in MCL 168.399 was repugnant to Mich Const 1963, Art 6, §2, which contains no holdover language. If Art 6, §2 actually said that "Justices of the Supreme Court may not holdover," there would, indeed, be obvious repugnancy between it and MCL 168.399 but, instead, Art 6, §2 fails to either affirmatively permit or prohibit Supreme Court justices to holdover.

Under the Michigan Constitution, the Legislature has the plenary power to act except where specifically prohibited therein. As this Court said in *Advisory Opinion On Constitutionality of 1976 PA 240,* 400 Mich 311, 317-318; 254 NW2d 544 (1977):

OLAN, THOMSEN
& VILLAS, P.C.
ATTORNEYS AT LAW
9 SOUTH MAIN STREET
ON RAPIDS, MICHIGAN
48827-1291
(517) 663-3306

> "The Michigan Constitution is not a grant of power to the Legislature as the United State Constitution, but rather, it is a limitation on general legislative power."

There is neither an explicit or implicit conflict between Art 6, §23 and MCL 168.399. It is within the plenary power of the Legislature to pass legislation that supplements constitutional provisions. This is true even in the case of so-called self-executing provisions of the Constitution. As this Court stated in *Hamilton* v *Secretary of State*, 227 Mich 111, 116; 198 NW 843 (1924):

> "While legislation may not be necessary to effectuate the constitutional provision and none may be validly enacted that is in conflict with it, it does not follow that legislation supplemental to and an aid of the constitutional provision may not be enacted."

The mere absence of holdover language in Art 6, §2 – as opposed to language prohibiting holdover – means the Legislature may enact a law providing for holdover. In this regard, see Justice Ryan's dissent in *Riley,* 417 Mich at 198-199. Judge Clarke again reiterates that every statute is presumed to be constitutional, and it is the duty of the courts to construe statutes as such, unless its unconstitutionality is clearly evident. As this Court said in *Phillips* v *Mirac, Inc.*, 470 Mich 415, 423; 685 NW2d 174 (2004), quoting from *Cady* v *Detroit*, 289 Mich 499, 505; 286 NW 805 (1939):

> "Every reasonable presumption or intendment must be indulged in favor of the validity of an act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution that a court will refuse to sustain its validity."

It would be extremely rare for a statute which does not conflict with a specific prohibition in the Michigan Constitution to be deemed unconstitutional. This might arise

NOLAN, THOMSEN
& VILLAS, P.C.
ATTORNEYS AT LAW
39 SOUTH MAIN STREET
RON RAPIDS, MICHIGAN
48827-1291
(517) 663-3306

if, for instance, although there is no direct conflict between the statute and the Constitution, it is clearly evident from what the Constitution does address that the statute conflicts with some fundamental policy enshrined in the Constitution. That is simply not the case with MCL 168.399. While Art 6, §2 makes it clear that a Supreme Court justice enjoys an eight year term when elected, it does not purport to address holdovers so this is a proper subject which the Legislature may address by statute. Certainly, there is clearly room for "reasonable doubt" as to whether MCL 168.399 conflicts with Art 6, §2. It was, of course, the conclusion of the dissenting justices in *Riley* that MCL 168.399 was constitutional, and in Judge Clarke's view, the statute is constitutional. Thus, even if Art 6, §23 did not provide for holdover, which it does, Justice Riley had the right to holdover under MCL 168.399.

With respect to Judge Clarke, of course, whether or not MCL 168.399 is or is not constitutional is irrelevant to his right to retain office. Holdover language appears in MCL 168.467i; setting forth the terms of district court judges. Whatever conclusion one may reach as to the constitutionality of MCL 168.399, there is simply nothing in the Constitution that sets forth a district court judge's term of office and, thus, the statutory holdover language does not conflict with the Constitution.

IV. Article 6 §4 Does Not Allow the Michigan Supreme Court to Remove a Sitting Judge

The writ of Quo Warranto does not lie to remove a judge in Michigan.

Article IV, Section 4 of the Michigan Constitution of 1963 provides:

> Sec. 4. The Supreme Court shall have general superintending control over all courts; power to issue, hear and determine prerogative and remedial

NOLAN, THOMSEN & VILLAS, P.C.
ATTORNEYS AT LAW
39 SOUTH MAIN STREET
TON RAPIDS, MICHIGAN
48827-1291
(517) 663-3306

> writs; and appellate jurisdiction as provided by rules of the Supreme Court. The Supreme Court shall not have the power to remove a judge. History: Const. 1963, Art. VI, §4, Eff. Jan. 1, 1964. Former Constitution: See Const. 1908, Art. VII, §4.

It is difficult to present or to discuss the issue of whether or not the Supreme Court has the power to remove a judge. Indeed, there can be no such issue. The plain, unambiguous words of the Constitution forbid it. Short of convoluted philosophic debate over whether there is such a thing as truth, or whether words have any cognizable meaning, it is hard to imagine any rational hypothesis suggesting that there might be some circumstance in which the Supreme Court might indeed have the power to remove a judge.

The people of Michigan, when adopting the Constitution of 1963, opted for an elected judiciary. They provided two ways for judges to be removed from office.

Article 11, section 7 provides for impeachment of public officers for corruption or crimes. A majority vote of the House of Representatives is needed. Section 7 reads as follows:

> Sec. 7. The house of representatives shall have the sole power of impeaching civil officers for corrupt conduct in office or for crimes or misdemeanors, but a majority of the members elected thereto and serving therein shall be necessary to direct an impeachment. Prosecution by 3 members of house of representatives. When an impeachment is directed, the house of representatives shall elect three of its members to prosecute the impeachment
>
> No judicial officer shall exercise any of the functions of his office after an impeachment is directed until he is acquitted. History: Const. 1963, Art. XI, §7, Eff. Jan. 1, 1964. Former Constitution: See Const. 1908, Art. IX, §§1-4.

OLAN, THOMSEN
& VILLAS, P.C.
ATTORNEYS AT LAW
9 SOUTH MAIN STREET
ON RAPIDS, MICHIGAN
48827-1291
(517) 663-3306

Article VI, Section 25 gives the Governor the power, with the concurrence of two thirds of both houses of the legislature to remove a judge for a cause less that an impeachable offense. Section 25 reads as follows:

> "For reasonable cause, which is not sufficient ground for impeachment, the governor shall remove any judge on a concurrent resolution of two-thirds of the members elected to and serving in each house of the legislature. The cause for removal shall be stated at length in the resolution. History: Const. 1963, Art. VI, §25, Eff. Jan. 1, 1964. Former Constitution: See Const. 1908, Art. IX, §6."

In 1968, Section 30 was added to the Judicial Article, creating the Judicial Tenure Commission. It gave the Supreme Court the limited power to remove a judge on the recommendation of the Judicial Tenure Commission. Section 30 reads as follows:

> (1) A judicial tenure commission is established consisting of nine persons selected for three-year terms as follows: Four members shall be judges elected by the judges of the courts in which they serve; one shall be a court of appeals judge, one a circuit judge, one a probate judge and one a judge of a court of limited jurisdiction. Three shall be members of the state bar who shall be elected by the members of the state bar of whom one shall be a judge and two shall not be judges. Two shall be appointed by the governor; the members appointed by the governor shall not be judges, retired judges or members of the state bar. Terms shall be staggered as provided by rule of the supreme court. Vacancies shall be filled by the appointing power.
>
> (2) On recommendation of the judicial tenure commission, the supreme court may censure, suspend with or without salary, retire or remove a judge for conviction of a felony, physical or mental disability which prevents the performance of judicial duties, misconduct in office, persistent failure to perform his duties, habitual intemperance or conduct that is clearly prejudicial to the administration of justice. The supreme court shall make rules implementing this section and providing for confidentiality and privilege of proceedings. History: Add. H.J.R. PP, approved Aug. 6, 1968, Eff. Sept. 21, 1968.

OLAN, THOMSEN
& VILLAS, P.C.
ATTORNEYS AT LAW
9 SOUTH MAIN STREET
ON RAPIDS, MICHIGAN
48827-1291
(517) 663-3306

But, it is argued, the Constitution cannot mean that the Supreme Court is without power to oust an imposter, a pretender, someone with no right or authority to act. Someone who is not in fact a judge.

Of course the court can remove a pretender. But not by quo warranto. If a group of protesters storms the courthouse, physically removes the judge from the bench and installs someone of their own choosing, the remedy is to call the police.

Quo Warranto does not lie in those circumstances. Quo Warranto is a writ which asks by what right does the respondent exercise the powers of a public office. By definition, the respondent is a de facto office holder, actually exercising the powers of the office. The writ is carried out by an order of ouster, which removes the respondent from the office.

There is no question that Hugh Clarke is a Judge of the District Court. He has a commission of appointment from the Governor. He has a key to the office and an underground parking space. He wears a robe. He administers a docket. He receives a salary from the City of Lansing and the state. He is doing the people's business, rendering judgments, deciding cases.

The Supreme Court, and a fortiori, all other courts in Michigan, have no power to remove him on their own motion, or at the behest of the Attorney General or anyone else. He can be impeached. He can be removed by the Governor with concurrence of the

NOLAN, THOMSEN
& VILLAS, P.C.
ATTORNEYS AT LAW
9 SOUTH MAIN STREET
ON RAPIDS, MICHIGAN
48827-1291
(517) 663-3306

legislature or by the Supreme Court on recommendation of the Judicial Tenure Commission. But he cannot otherwise be removed by order of any court for any reason.

But it is argued that if someone other than Judge Krause had been elected to the District Court in November, it is patently wrong to claim that Judge Clarke would have been entitled to serve until the next election. Isn't it therefore necessary for the court to have the power to remove the appointed judge in order to make way for the newly elected judge to assume the seat to which he or she was elected?

No, indeed. It is not necessary. The newly elected judge would simply show up on January first and take the oath of office. The Court Administrator would have the name on the door and on the payroll changed.

The situation would be no different than if any judge, defeated for reelection, should refuse to vacate his office. His successor will be the de facto judge, and the ousting would not be by Quo Warranto, but by executive action.

The people of Michigan opted for an elected judiciary in 1963. They provided that vacancies in judicial offices would be filled by election. Persons formerly elected as judges were to be called back for temporary judicial services as needed when vacancies occurred. But these temporary substitutes were not successors to the judge who died or resigned. His or her successor was to be elected.

The amendment in 1968, which restored the Governor's power of appointment to fill vacancies, assumed that there would be an election before the end of the term of

NOLAN, THOMSEN
& VILLAS, P.C.
ATTORNEYS AT LAW
39 SOUTH MAIN STREET
TON RAPIDS, MICHIGAN
48827-1291
(517) 663-3306

office in which a vacancy occurs. No doubt that is usually the case. But not always. When a vacancy occurs after a successor is elected, the language of the amendment is patently contradictory. And therefore ambiguous.

Does the appointee serve until the first of January after the next election or until the first of January after the successor is elected? Where the successor is already elected when the vacancy occurs, he can't do both.

Logic, good policy and common sense dictate that the ambiguity be resolved in favor of the latter.

But where there is no newly elected judge waiting in the wings to take the oath on the first of January, there is no ambiguity and no legal or logical basis to circumvent the literal application of the plain words of the amendment.

The constitution was drafted to create an elected judiciary and to shield the judges from the threat of political removal. Judges often have to make unpopular decisions and are often called upon to make decisions which have political ramifications. It was the obvious purpose of the framers and of the people who ratified the constitution to shield their judges from punitive removal or ousting based upon partisan political power.

The majority in Attorney General v Riley hinted at the idea that, since the Justice who died was a Democrat, elected by a wide majority, the incoming Governor was a popular Democrat and the outgoing lame duck Governor was a Republican, it was only

OLAN, THOMSEN
& VILLAS, P.C.
ATTORNEYS AT LAW
9 SOUTH MAIN STREET
ON RAPIDS, MICHIGAN
48827-1291
(517) 663-3306

fair and in accord with the will of the people to allow the new Governor to make the appointment.

The shoe is now on the other foot. A Republican Attorney General seeks to oust the appointee of an outgoing Democratic Governor in favor of allowing a new Republican Governor to make an appointment.

Nothing could be more illustrative of the wisdom of the drafters of the 1963 Constitution in their declaration that "the Supreme Court shall not have the power to remove a judge."

Keeping our courts out of raw partisan politics is an objective shared by all citizens of good will and common sense. That's why they wrote and ratified that restriction.

WHEREFORE, the Defendant, the Honorable Hugh Clarke, respectfully requests this Honorable Court to grant his Emergency Application for Leave to Appeal and enter an Order Staying the Proceedings in the Michigan Court of Appeals, enter an Order Bypassing the Michigan Court of Appeals, and further, enter an Order Dismissing the Plaintiff's Complaint for Quo Warranto.

Respectfully Submitted,

NOLAN, THOMSEN & VILLAS, P.C.

Dated: February 1, 2011

By: Lawrence P. Nolan

Lawrence P. Nolan (P25908)
Attorney for the Defendant
The Honorable Hugh Clarke

NOLAN, THOMSEN
& VILLAS, P.C.
ATTORNEYS AT LAW
9 SOUTH MAIN STREET
ON RAPIDS, MICHIGAN
48827-1291
(517) 663-3306